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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 325

THE STATE OF FLORIDA, EX REL. VIRGIL D. HAWKINS,

PETITIONER,

vs.

THE BOARD OF CONTROL OF FLORIDA, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF FLORIDA, ET AL.,

RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of Florida of August 1, 1950, are reported in 47 So. 2d 608; 47 So. 2d 617; 47 So. 2d 618; 47 So. 2d 619; and 47 So. 2d 620. (State ex rel Hawkins vs. Board of Control; State ex rel Lewis vs. Board of Control; State ex rel Maxey vs. Board of Control; State ex rel Boyd vs. Board of Control; State ex rel Finley vs. Board of Control, respectively). The opinions of the Supreme Court of Florida of June

15, 1951, in the respective cases cited above, are reported as follows: 53 So. 2d 116; 53 So. 2d 119; 53 So. 2d 119; 53 So. 2d 120; 53 So. 2d 119.

The Court's opinion was written in the Hawkins case only; in each of the four other cases, the Florida Court said only that it was governed by the Hawkins case. All record references herein are to the Hawkins case record.

JURISDICTION

The jurisdiction of this Court is attempted to be invoked under Title 28, Section 1257(3), U. S. Code. The petitioners predicate their claims for relief upon the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

In the Statement of the case, the petitioners' brief is somewhat inaccurate in the averment (p. 5) that the Court refused to enter a final order and retained jurisdiction to permit either party to come before the Court for whatever further relief might then be warranted. A more accurate statement would be that the Court withheld final order and retained jurisdiction, so that either party *might furnish proof that the respondents had complied, or had not complied, with the requirement of furnishing petitioners with the opportunities and facilities to which they were entitled upon their due reapplication,* and authorized either party to apply for final order after due and regular application for enrollment by relators and proof that the respondents had or had not supplied the relators with such opportunities and facilities (R. 38).

Also, there is nothing in the record to support the statement in petitioners' brief (p. 5) that the petitioners re-applied to the University of Florida for the courses desired on August 7, 1950. That date was subsequent to the Florida Court's original order and opinion. Any such statement, if properly presented or pleaded, would be shown to be only a half truth, and that petitioners refused to complete their applications.

QUESTION PRESENTED

I.

Are the judgments below final judgments within the meaning of Title 28, Section 1257(3), such as to give this Court jurisdiction on certiorari?

In their brief, (p. 2) the petitioners submit two questions, both of which are on the merits and not properly to be considered in the present proceedings. We quote and discuss them hereinafter.

ARGUMENT

JURISDICTION

I. THE JUDGMENTS BELOW ARE NOT FINAL

The jurisdiction of this Court is sought under Title 28, Section 1257(3), which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Court has no jurisdiction of these causes because neither the orders of the Supreme Court of Florida of August 1, 1950, nor those of June 15, 1951, denying motions for peremptory writs of mandamus, are final orders or decrees within the purview of the Code. In the first designated opinion, the Court said in part:

> "Due to the nature of the issues arising out of the pleadings, it is our conclusion that the entry of a final order herein should be withheld and the jurisdiction of the cause retained until it be shown to the satisfaction of this court either that the Board of Control has furnished, or has failed to furnish, to the relator, in accordance with the

> principles stated in this opinion, and after his due application for enrollment, such opportunities and facilities for pursuing his desired course of study as are substantially equal to those afforded all other students duly enrolled in the same or a like course of study at any of the tax-supported institutions of higher learning within the State wherein such course is offered." (R. 38).

Likewise, in the opinion of June 15, 1951, the Court said:

> "Accordingly, the motion for peremptory writ the return notwithstanding should be, and the same is hereby, denied, without prejudice to the right of the relator to move for the entry of a peremptory writ when he is able to show to the satisfaction of the Court that he has brought himself within the principles enunciated in State ex rel Hawkins v. Board of Control, supra."

The petitioners by their own language recognize the lack of finality of the Court's first opinions by referring to them in their petitions for peremptory writs of mandamus filed May 16, 1951, as an "interlocutory order." (R. 39)

Simply, then, the first opinions settled the law of the case, leaving open for future determination, upon proper showing and presentation of the ultimate facts, whether or not the petitioners or any of them are, upon the proof adduced, entitled to relief. The second opinions (R. 40) determined there was no proof of facts presented to the Court to bring the petitioners "within the principle enunciated in State ex rel Hawkins v. Board of Control, supra" (R. 43).

In order to meet the requirements of the statute so that this Court has jurisdiction, the Court's judgment

must be "* * * final as an effective determination of the litigation and not of merely interlocutory or immediate steps therein. It must be the final word of a final court." Market Street R. Company vs. Railroad Commission of California (1945), 65 S. Ct. 770, 324 U. S. 548, 89 L. Ed. 1171. In other words, the judgment to which a petition for certiorari is directed must terminate the litigation on the merits.

An order of the highest court of the State affirming an administrative order of a commission which left certain terms to be agreed upon by the respective parties or if they were unable to agree, to be fixed by the commission, is not "final." Republic Natural Gas Company v. Oklahoma (1948) 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212.

The true test of finality is whether the record shows that the order has in fact fully adjudicated all rights, which adjudication is not subject to further review by a State court. Department of Banking v. Pink, 317 U. S. 264, 87 L. Ed. 254, 67 S. Ct. 233.

The Florida rule is that a final decree is one which definitely disposes of the case on its merits and no questions remain open for judicial determination. Cone v. Benjamin, 142 Fla. 604, 195 So. 416; Alderman et al. v. Puritan Dairy, Inc., et al., 145 Fla. 292, 199 So. 44; see also Janet Realty Corporation v. Hoffmans, Inc., 154 Fla. 144, 17 So. 2d 114, and Irving v. Kaplan, 155 Fla. 120, 20 So. 2d 351.

There has been no such determination by the Supreme Court of Florida. In fact, the Court has specifically retained jurisdiction and withheld its final orders by use of the following language, to-wit:

> "Either party to this cause may apply in this proceeding for the entry of an appropriate order finally disposing (fols. 63-64) of the case, after due and regular application for enrollment has been made by the relator and such opportunities and facilities have or have not been made available to him in such a tax supported institution of higher learning." (R. 38)

The orders of June 15, 1950, cannot be considered in any sense final orders or decrees, for the petitioners were, or are, by no means foreclosed thereby. The Court expressly stated that the motions for peremptory writs of mandamus were denied, without prejudice, reserving to the petitioners the right to present any proof or evidence which might fall within the scope of its original opinion in State ex rel Hawkins v. Board of Control. The judgments or decrees involved were on the pleadings. As the Court pointed out, the motions for peremptory writs are in effect demurrers. The orders contemplate the presentation of proof or evidence by the litigants, as plainly appears from the opinion, and the judgments are not final within the meaning of Title 28, above referred to, so as to entitle the petitioners to invoke the jurisdiction of the Supreme Court of the United States.

The several fundamental questions of fact in dispute between the parties were left undetermined because no proof was submitted. The Court's retention of jurisdiction was to afford the petitioners an opportunity to present such proof.

As shown by the record, the original orders of the Supreme Court of Florida were entered upon August 1, 1950 (R. 25). On May 16, 1951, the petitioners filed their second motions for peremptory writs of mandamus

in the Supreme Court of Florida (R. 39). These motions added nothing to the case. By these, the petitioners attempted to re-argue the cases as originally decided by the Supreme Court of Florida.

The position taken by the petitioners on the second motions completely ignores their non-compliance with the opinions of the Supreme Court of Florida of August 1, 1950, by reason of their failure to present any proof to substantiate their respective claims or rights for relief. It was upon this ground that the Court denied the motions (R. 43). Further, the argument of the petitioners overlooks an absence of any facts upon which the Court could enter final decrees or judgments in the face of the pleadings. The Court points out that the petitioners had no application pending for admittance to a current or future term at any State maintained institution of higher learning. It added:

> "Certainly, the requirement that he keep his application current for each succeeding term is not unreasonable, for as much as this is required of every student, whether white or negro, desirous of attending classes at any state maintained institution of higher learning. Without such requirement it is plain that budgets comprehensive enough to meet legitimate educational needs could never be intelligently framed nor could state funds be made available in every instance to meet them." (R. 37)

The second opinions turn specifically upon the petitioners' failure to show by proof a change in their status since the original opinions, or to make proof of any of the material facts on which petitioners base their claims.

The petitioners might have obtained a final order

within the meaning of the statute on jurisdiction in either of two ways:

They might have proceeded, as authorized by the Court, to present proof of the facts essential to their cases, and thereby obtain a final determination of facts and law and all matters in dispute.

Or, they might have filed in the Florida court appropriate pleading declining to proceed further and requesting final orders, which would have resulted in orders of dismissal, and subject to review on certiorari.

The petitioners did neither, and the cases remain at this moment exactly where they stood when the Court entered its first orders; that is to say, the petitioners may come in and obtain final orders by either of the methods just mentioned.

The petitioners request the Court to assume certain material facts, (1) as to which no proof has been offered, and (2) which, when and if properly pleaded or presented, will create a sharp issue of fact. For example, and in addition to other disagreement as to the facts, the respondents would take issue with almost every allegation of fact in the petitioners' second motion for peremptory writ, filed on May 6, 1951, if and when such allegations may be properly pleaded or presented. What the total proof of material facts may be in each of the five cases, no one knows with certainty and no one will know until the parties have presented their proof.

In mandamus, the order is based upon the facts as they exist at the time the proof is submitted to the Court, not as of the time of filing the petition or any intervening time.

There can be no final orders until further proceedings

are had in the Florida court; and, until final orders are entered in such further proceedings, this Court does not have jurisdiction.

II. PETITIONERS' QUESTIONS ARE MOOT

There are no pending applications of petitioners for admission to any institution of higher learning in the State.

As the Florida court pointed out in its opinions of June 15, 1951, on petitioners' second motions for peremptory writs, petitioners have failed to make re-application and comply with the requirements for all students, white, or Negro, in the matter of enrollment. The Florida court said (R. 43):

> "A mere casual inspection of the motion discloses that the relator has made no showing entitling him to the issuance of the peremptory writ. The strongest averment in favor of the relator is the pure legal conclusion that the relator 'has exhausted all reasonable means available to him for attaining admittance to the University of Florida,' without any averment appearing in the motion as to what steps, if any, (fols. 72-73) have been taken by the relator to enroll for the law course he desires to pursue or otherwise to bring himself within the principles enunciated in State ex rel Hawkins v. Board of Control, supra. Moreover, the motion is not accompanied by any proof of the matters alleged in the motion—assuming, for the sake of argument only that the averments are sufficient—and it is elementary that a motion is not in and of itself proof of the averments therein contained."

It is to be noted that the Florida Court calls attention to the fact that averments in a motion are not of themselves proof of the averments.

III. THE DECISIONS BELOW ARE CLEARLY CORRECT

The Court is not, for the purpose of this hearing, interested in the merits of the case. However, both questions submitted by petitioners' brief relate to the merits and, in so far as petitioners have attempted argument in support thereof, the respondents will make a brief reference to the same. The petitioners' first question on the merits is as follows:

> "Can the State refuse to admit petitioners to the University of Florida solely because of race and color for the pursuit of graduate education and training in law without violating petitioners' rights to the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States?"

The answer to this question is very simple. Every case decided by this Court on that question gives an affirmative answer thereto. The answer is that the State may refuse to admit petitioners to the University of Florida because of their race or color without violating their rights under the Constitution of the United States by providing separate, but equal, facilities. This Court has recognized that principle in every case submitted to it. Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547; Plessy v. Ferguson, 163 U. S. 537, 41 L. Ed. 256; Gong Lum v. Rice, 275 U. S. 78, 72 L. Ed. 172; McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151, 59 L. Ed. 169; Missouri ex rel Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208; Sipuel v. Oklahoma Board of Regents, 332 U. S. 631, 92 L. Ed. 247, 68 S. Ct. 299; Cumming v. Richmond Co. Bd. of Education, 175 U. S. 528, 20 S. Ct. 197, 44 L. Ed. 262.

The petitioners' second question reads:

> "On the basis of a resolution of the Board of Control ordering the establishment at the Florida A. & M. College for Negroes of the courses which petitioners seek to pursue and which provides for petitioners' admission to the University of Florida on a segregated basis in the event the courses desired are not available at Florida A. & M. College at the time petitioners seek to enroll therein, especially where the answers filed conclusively show that the courses ordered established at Florida A. & M. College were not in fact in actual operation, can the State of Florida avoid its constitutional obligation of immediately admitting petitioners to the University of Florida?"

The question is not quite clear, but we understand its purpose is to question the constitutional validity of the Board of Control resolution of December 21, 1949. (R. 22).

Reference to that resolution will show that it is based, first, upon the decisions of this Court in relation to admission of Negro students to tax-supported State institutions of higher learning and, secondly, in so far as may not be in conflict with the decisions of this Court, upon the laws of the State. In other words, the Board of Control first of all required compliance with the holdings of this Court and then, in so far as not in conflict with the decisions of this Court, carried out its further duty by requiring compliance with the laws of the State. The Supreme Court of Florida said in its first opinion (R. 33):

> "No court in the land has ever required of a sovereign state any more than is encompassed within the plan proposed by the Board of Control in its answer. Every individual political right and privilege guaranteed the citizen by the pro-

> visions of the Federal Constitution is maintained under the program, while at the same time the right of the State to adopt such method as it finds best designed to afford substantially equal educational opportunities to Florida citizens of different race groups has been preserved."

In support of that statement, the Florida Court cited the most recent cases of this Court on the subject.

There can be no doubt that if the petitioners' proof, when submitted, shows them entitled to admission to the University of Florida under the holdings of this Court, the Florida Court will order their admission.

The Board of Control resolution provides (R. 24) in substance that, if the Florida Agricultural and Mechanical College for Negroes should not afford opportunities substantially equal to those given at the University of Florida, the Negro students should be admitted to the University of Florida and the authorities of that institution required at all times to "observe all requirements of the laws of the State of Florida in the matter of segregation of the races, etc."

Apparently, the petitioners' chief objection to the resolution is its reference to segregation at the University of Florida under such circumstances. But what segregation? There is nothing before the Court as to any segregation under such circumstances and, if there were segregation, whether it is lawful or unlawful. Again, there is no proof of any violation of the petitioners' constitutional rights by segregation, and no proof of segregation. The Court had nothing on which to base a determination. The gist of petitioners' argument is that any segregation anywhere, whether by separate but equal schools or otherwise, is unlawful. There is no support for that contention.

IV. THERE IS NO CONFLICT OF DECISION

The decisions of the Supreme Court of Florida are not, in any wise in conflict with Sweatt v. Painter, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114; McLaurin v. Okla. Bd. of Regents, 339 U. S. 637, 94 L. Ed. 1149, 70 S. Ct. 851; Bd. of Supervisors of L. S. U. v. Wilson, 92 F. Supp. 986, affirmed 95 L. Ed. 657; McKissick v. Carmichael, 187 F. 2d 949, or any other holdings of this Court in similar cases. In each of these cases, the Court's decision rested upon the merits. We again emphasize that the facts have never been presented to the Florida Court by the petitioners as pointed out in the two opinions of that Court.

The records are devoid of any evidence that the resolution of the Board of Control does or does not discriminate against the petitioners; does or does not afford substantially equal educational opportunities to all Florida citizens, regardless of race; does or does not violate the equal protection clause. The petitioners have chosen to utterly disregard the opportunity afforded them by the Supreme Court of Florida. They have no standing in the Supreme Court of the United States upon the records presented.

V. CONCLUSION

The respective writs of certiorari should properly be denied, because:

(1) The orders or judgments of the Supreme Court of Florida are not final, and the Supreme Court of the United States is without jurisdiction.

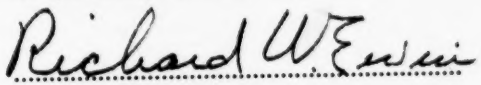
(2) None of the issues of fact have ever been presented for determination by the Florida Court.

(3) Until they re-apply for admission and present their cases, there is nothing before the Court.

(4) The resolution of the Board of Control and the Florida Court's interpretation and application thereof are in full accord with the holdings of this Court.

(5) Finally, the remedy of the petitioners is to take advantage of the generous opportunity accorded them by the Supreme Court of Florida, in retaining jurisdiction for the purpose of hearing any proof or competent evidence, indicating a compliance or non-compliance with the principles announced in State ex rel Hawkins v. Board of Control, supra, which recognized fully and completely the holdings of this Court.

Respectfully submitted,



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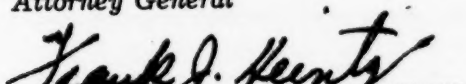

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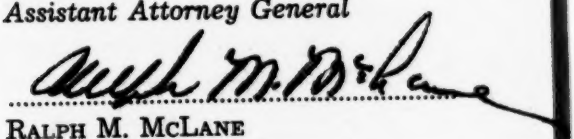

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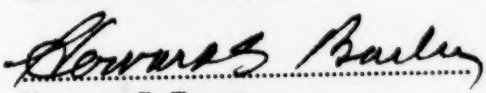

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